IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3081 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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NARESHKUMAR SHASHIKANT PAREKH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3081 of 2001

MR BP GUPTA for Petitioner No. 1

Mr PITAMBAR ABICHANDANI, Ld. AGP for Respondent No. 1-2

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 06/09/2001

ORAL JUDGEMENT

1. Heard Mr. YN Oza, learned Senior Counsel for petitioner and Mr. Pitambar Abichandani learned AGP for the respondents.

2(i) The petitioner has invoked the jurisdiction of this Court under Article 226 of the Constitution of India and has prayed that this Court should issue a writ of mandamus or any other appropriate writ, order or directions to the respondents to the effect that the petitioner should be promoted to the post of Junior Inspector of Factories and also he should be given deemed date of promotion of the day on which juniors to the petitioner are promoted. Obviously, the petitioner has prayed for consequential and other incidental benefits.

(ii) Respondent-State while resisting the plea of the petitioner has contended that however, as per the provision contained in the G.R. No. SLT-1080-895-G.2, dated 23.9.81 of the General Administration Department, the Government Servants whose name included in the select list against whom, subsequently departmental proceedings have been initiated should not be promoted on the basis of inclusion in the select list, until his completely exonerated of the charges against him (Annexure-I is the copy of the said G.R.) In the instant case, the departmental inquiry has been initiated against the petitioner on 31.3.2001 and charge-sheet has been issued on 23.4.2001 on the basis of the Vigilance Commission report dated 28.3.2001 before the petitioner could be promoted, as the departmental inquiry already initiated against the petitioner and he could not be promoted in view of the aforesaid provision contained in the Government G.R. stated herein before. In view of the facts and circumstances the Junior of petitioner's are promoted and if the petitioner is exonerated in the departmental proceedings.

3.(i) This petition is heard finally today and the submissions advanced are considered.

(ii) During the course of submissions on 4.9.2001, when this matter was listed for hearing, this court had directed learned AGP to call for the file under which the decision to initiate the departmental proceedings against the petitioner on the strength of the recommendation made by the Vigilance Commission of State of Gujarat was taken. This direction was issued on account of the submission made by learned counsel for petitioner that on the day of promotion i.e. 11.4.2001 when the juniors to the petitioner were promoted, there was no formal departmental proceedings pending and the Disciplinary Authority had not taken any conscious and clear decision for issuance of charge-sheet. Mr. YN Oza has hammered that it should be verified from the record that even the

draft charge was not available on the file of the department.

4.(i) It is not a matter of dispute that the petitioner is a person senior to the officers who are promoted vide order dated 11.4.2001, Annexure-B. The case of the petitioner for promotion was considered by the Departmental Promotion Committee in the meeting which was held somewhere in September, 1999 and names of the persons eligible for promotion were considered for the post of Junior Inspector of Factories and petitioner's name was included in the select list of persons to be promoted.

(ii) It is contended by the petitioner, and the same is not controverted that the persons at Sr. No. 15,20, and 21 were promoted somewhere in June, 2000. The persons juniors to the petitioner are promoted vide order dated 11.4.2001 whose names are at Sr. No. 24,25,26, 30 and 31 in the select list. Mr. YN Oza has taken me through the settled legal proposition reflected in the well-known decision in the case of UNION OF INDIA VS. K.V. JANKIRAMAN, reported in AIR 1991 SC p. 2010 and the decision of the Apex Court in the case of Delhi Jal Board vs. Mahinder Sing reported in (JT 2000 (10) SC p. 158 wherein the Apex Court has observed :

"The learned Single Judge of the High Court accepted the writ petitioner's contention following two judgments of this Court reported in [JT 1999(4) SC 489 = 1999 (5) SCC 762] Bank of India v. Degala Suryanarayana and in [JT 1998 (3)SC 123 - 1998 (4) SCC 154] State of A.P. v. N. Radhakishan and allowed the writ petition. It was held that once the first disciplinary inquiry resulted in favour of the writ petitioner, the benefit of the findings of DPC in the sealed cover should be given to the writ petitioner notwithstanding the pendency of a second inquiry. In the two judgments of this Court which were followed by the learned Single Judge, it was held that if a person's case had been considered for promotion by the Departmental Promotion Committee and because of pendency of certain charges, the findings of the DPC were kept in a sealed cover, he was entitled to the benefit of the findings of the selection, if they were in his favour if the disciplinary inquiry ended in his favour, notwithstanding the fact that by that date, some

other inquiry might have been pending against him."

The Apex Court has further observed that:-

"The sealed cover procedure was envisaged under the rules to give benefit of any assessment made by the Departmental Promotion Committee in favour of such an officer, if he had been found fit for promotion and if he was later exonerated in! the disciplinary inquiry which was pending at the time when the DPC met. The mere fact that by the time the disciplinary proceedings in the first inquiry ended in his favour and by the time the seal was opened to give effect to it, another departmental inquiry started by the department, would not, in our view, come in the way of giving him the benefit of the assessment by the first Departmental Promotion Committee in his favour in the anterior selection."

4(iii) The ratio of the above decisions clinches the issued raised by the petitioner. On perusal of the file tendered by learned AGP I must say that the State has come out with all fairness and the papers indicate that as such neither formal decision issuance of charge-sheet was taken nor direction to the subordinate staff member to draft out the charge-sheet was issued by the Disciplinary Authority. Of course, on 31.3.2000 the department had taken conscious decision that it needs institution of departmental proceedings and the departmental proceeding should be initiated. However, the fact remains that on 11.4.2001 there was no decision by the Disciplinary Authority directing the subordinate staff to frame the charge. As per Government record for three alleged wrong charge-sheet could have been issued. But it was not even decided that the proposed charge-sheet would consolidate covering all the three allegations prima-facie scrutinized or there will be separate charge-sheet for all the three charges.

5. In the case of Valimad Pirbhai Sunesara vs. State of Gujarat (Special Civil Application No. 744/1998) (Coram: N.N. Mathur,J.), the Government has taken similar stand that before the meeting of the Departmental Promotion Committee, the Government had

taken conscious decision to initiate the departmental inquiry against the petitioner of that petition. After dealing with the factual aspect raised before the Court, this Court has observed that the department had remained careless in framing the charge-sheet after taking conscious decision to initiate the departmental enquiry. I agree that no such lethargy is found in this case, however, the fact remains that there was nothing against the petitioner on record, on the day on which his case was considered by the Departmental Promotion Committee in the year 1999. It is rightly held in the above cited case of Valimad Pirbhai Sunesara (supra) that to struck balance, the only rational view can be taken is to cast duty on the Department not only to take a conscious decision to initiate the departmental proceedings but also frame the charges and to take effective and sincere steps to serve on the employee. In this case, there was no scope existing on the day on which his case for promotion was considered. Even no such steps were taken on the day on which juniors to the petitioner were promoted i.e. on 11.4.2001.

5.(ii) The case of Amara Sarman Bharat Vs. State of Gujarat considered by this Court while dealing with Special Civil Application No. 10801 of 1998 also helps the present petitioner. While dealing with the case praying for promotion by the petitioner, this Court has observed that:-

"It is not disputed that explanation referred to hereinabove was sought from the petitioner on 3rd May, 1995, and the explanation was submitted on 26th July, 1995. Inspite of the said explanation, the respondent authorities have taken an unduly long time of more than three years in taking the decision whether the disciplinary action should be taken against the petitioner or not. The delay has not been explained. The decision has been taken only at the time when the petitioner was about to be promoted. In view of the decision in the matter of Valimad Pirbhai Sunesara vs. State of Gujarat (Special Civil Application NO. 744/98, decided on 7th July, 1998), the action of the respondents herein cannot be upheld. It is, therefore, directed that pending this petition, the petitioner be promoted as Executive Engineer in accordance with the decision of the Departmental Promotion Committee. The promotion granted to the petitioner herein, as directed hereinabove, shall be provisional and subject to the further

orders that may be made by this Court. On the basis of such promotion, the petitioner shall not be entitled to further promotion to a higher post."

It is true that the above decision is recorded while dealing with a plea to grant interim relief but it can be looked into being a egal reference having persuasive value.

6. Learned AGP Mr. Abichandani has pointed out that the decision of the Government is based on the policy of the Government reflected in Government Resolution No. SLT-1080-895-G-2, dated 23rd September, 1981 whereby the Government evolved a policy to consider the case of Government servants for promoting to higher post and has resolved that in the case of Government servants who are facing Departmental enquiries or whose conduct is under investigation could broadly be classified in a particular manner and it is further resolved that those against whom disciplinary proceedings are initiated i.e. on the basis of a preliminary enquiry or otherwise a decision has been taken by the competent authority to initiate disciplinary proceedings against them, but where a charge sheet and the statement of allegations have not been issued, the Government shall follow newly evolved policy. So, the case of the present petitioner would fall under sub-clause (iii) of para-2 of Government Resolution and non-issuance of charge-sheet would not come in the way in bye-passing the present petitioner while promoting his juniors.

7. According to me, sub-clause(iii) (in reference to para 5 & 7 of the said resolution dt. 23.9.81 issued by the GAD) is runs contrary to the legal proposition propounded by this Court and the Apex Court, and so it can also be said that the same is not in conformity with the propounded principles of service jurisprudence. Therefore, the petitioner should be given advantage of the prevailing law. Of course, the petitioner has not challenged the validity of clause (iii) of para-2 of the Government Resolution, but this Court can positively accept the plea of the petitioner to the effect that his case was not considered in proper perspective when his juniors were promoted. The name of the petitioner ought to have been included in the list of promotees who are promoted on 11.4.2001. Of course, the submission of learned AGP Mr. Abichandani has considerable force that the steps to frame the charge and the attempt of it's service in the present case could have brought a different result.

In view of the above set of facts, the respondents are directed to consider the case of present petitioner for promotion in light of the above legal settled position and pass appropriate orders promoting the petitioner and he is entitled to the consequential benefits. It is clarified that he would be entitled for promotion, if he is otherwise fit. The respondent-State may taken appropriate decision within four weeks from the date of receipt of the writ of this Court. Rule made absolute to the aforesaid extent. Direct service is permitted.

(C.K. BUCH, J.)

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